SUPREME COURT OF QUEENSLAND

CITATION:	*R v Perry* [2003] QCA 83
PARTIES:	**R** **v** **PERRY, David John** (applicant)
FILE NO/S:	CA No 330 of 2002 DC No 660 of 2001
DIVISION:	Court of Appeal
PROCEEDINGS:	Application for Extension (Sentence & Conviction)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 March 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2003
JUDGES:	McMurdo P, Davies and McPherson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Application for extension of time within which to appeal against sentence refused** **Application for extension of time within which to appeal against conviction refused**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST CONVICTION RECORDED ON PLEA OF GUILTY - where applicant pleaded guilty - where applicant convicted of one count of armed robbery in company and one count of stealing – where applicant seeks an extension of time within which to appeal against the said convictions – where applicant seeks an extension of time within which to apply for leave to appeal against an effective sentence of five and a half years *R v Mackenzie* [2000] QCA 324; CA No 353 of 1999, 11 August 2000, applied *R v Perry* [2002] QCA 345; CA No 273 of 2001, 4 September 2002, considered
COUNSEL:	The applicant appeared on his own behalf R G Martin for the respondent
SOLICITORS:	The applicant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** The applicant seeks an extension of time within which to appeal against conviction on two counts, one of armed robbery in company and one of stealing a 48 cm television. He also seeks an extension of time within which to apply for leave to appeal against an effective sentence of five and a half years imprisonment with a recommendation for post-prison community based release on 12 August 2003 imposed on numerous charges contained in several indictments.

[2] The applicant faces a number of difficulties. First, he pleaded guilty to all these counts. A plea of guilty is not lightly overturned; the applicant must, at the least, demonstrate that his plea of guilty was not an informed and voluntary one based on competent legal advice.[1] Second, he lodged last year an application for an extension of time to appeal against his conviction on the same two offences and on the same grounds as his present application; that application was abandoned by his solicitors on 26 June 2002. Third, he lodged an application for leave to appeal against sentence within time and that application has been determined; it was largely unsuccessful, apart from some changes to the structure of the sentence imposed which did not interfere with the effective overall sentence: see *R v Perry*.[2]

[3] The details of the offences to which the applicant pleaded guilty and was sentenced at first instance are set out in *R v Perry*.[3] It is not necessary to repeat those details here. The applicant was represented by Mr Nolan of counsel instructed by Harris Sushames in his application to this Court in September last year for leave to appeal against sentence. The only ground argued was that the effective sentence imposed was manifestly excessive in that the learned primary judge erred in giving insufficient weight to the plea of guilty and the applicant's attempts at reform.

[4] The applicant concedes he earlier gave instructions to his lawyers to abandon the application for an extension of time for leave to appeal against conviction. He now says that he made that decision on economic grounds and because he believed his application for leave to appeal against sentence would be successful. There was nothing to prevent him from pursuing the conviction application and appearing for himself, as he now does. He has not established that his decision to abandon that application in June last year was not freely made.

[5] In any case, he has not established any prospects of success in an appeal if the extension of time were granted. His first complaint seems to be that he misunderstood what the learned trial judge said when he first pleaded guilty to a number of offences on 30 August 2001. He believed that he would not have time to prepare for the robbery trial, which was only adjourned to 3 September 2001; he did not think the judge would grant an adjournment to any new counsel appearing for him on the following Monday. The transcript of proceedings on 30 August 2001 shows that such a belief was completely unjustified. The judge clearly left open the possibility that the robbery trial may need to be adjourned again on 3 September. Additionally, he says his decision to plead guilty was affected by the judge's revocation of bail and he believed the judge was going to sentence him on the robbery matter regardless of any trial. The judge's refusal of bail was an unexceptional exercise of discretion in circumstances where the mature applicant, who had a substantial criminal history including periods of imprisonment, had pleaded guilty to a large number of property offences requiring the imposition of a

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1 *R v Mackenzie* [2000] QCA 324; CA No 353 of 1999, 11 August 2000.
2 [2002] QCA 345; CA No 273 of 2001, 4 September 2002.
3 Ibid.

custodial sentence. The applicant's wife and co-offender on some counts was granted bail but this seems to have been because she had the care of young, dependant children. The applicant has not established that these matters rationally influenced his plea of guilty.

[6] An affidavit from the applicant's barrister indicates that the applicant firmly instructed him to plead guilty to all counts prior to 30 August 2001; the applicant then changed his instructions indicating that he wished to plead not guilty to the offence of armed robbery and another count. The applicant appeared before the learned primary judge on 30 August 2001 and entered pleas of guilty in accordance with his new instructions. After the court appearance he instructed his barrister that he wanted to plead guilty to the remaining two counts, despite his barrister's advice that the prosecution may have difficulty locating witnesses and establishing their case; he was distressed that he had been denied bail and that his trial had only been adjourned for a short period; he instructed his barrister to inform the judge of his change of plea immediately; his decision to plead guilty was voluntary and influenced by the prospect of his wife giving evidence against him.

[7] The applicant has presented affidavit material to the Court which suggests that on the date the robbery offence is charged in the indictment as occurring in Bundaberg, he was attending a funeral in the Ipswich area. The applicant's claims of innocence of this offence have turned on his contention that although he was present and took property from the complainant he did not do so with threats of violence and took only what he believed he was entitled to take. In the light of the applicant's plea of guilty, the further evidence, which throws doubt on the date of the offence but not on its commission by the applicant, is not sufficient reason to set aside the plea of guilty. The applicant has not demonstrated any good reasons for now extending time to consider an appeal against conviction which plainly has no real prospects of success, especially when he has previously abandoned the very same application.

[8] The applicant further contends that his barrister in this Court was also incompetent in not tendering reports and letters supporting the fact of his rehabilitation. Most of these letters were not prepared until after the sentence. The solicitors wrote to the applicant explaining that they did not attempt to put these matters before the Court of Appeal first, because they were not matters that would ordinarily be accepted by an appeal court as they were not before the sentencing judge and second, they were not of much weight. That was a reasonable course to have adopted. The application for leave to appeal against sentence was conducted with competence and propriety. The decision of this Court in *R v Perry*,[4] which determined that the sentencing court gave adequate weight to factors of rehabilitation, is final and the applicant has not demonstrated any reason for re-opening that hearing and nor is he entitled to a second appeal.

[9] The applicant made an informed choice on apparently competent legal advice to plead guilty at first instance. He was disappointed with the sentence imposed and felt it did not sufficiently recognise his attempts at rehabilitation. He subsequently applied for leave to appeal against that sentence and for an extension of time within which to appeal against conviction. He made an informed decision to abandon the latter application. He was unhappy that the former application was effectively unsuccessful. He now wishes to relitigate matters which have already been finally

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4 Ibid.

determined by this Court. He has not demonstrated any reason why that is either possible or desirable.

[10] The applicant would be better to use the newly prepared material to persuade the parole authorities that he is a suitable candidate to be released on post-prison community-based release in accordance with the original court's recommendations.

[11] I would refuse both the application for an extension of time within which to appeal against sentence and the application for an extension of time within which to appeal against conviction.

[12] **DAVIES JA:** I have read the reasons for judgment of the President. I agree with the orders which she proposes and generally with her reasons for those orders.

[13] **McPHERSON JA:** I agree with the reasons of the President for refusing these applications.